

STATE OF MICHIGAN
COURT OF APPEALS

UNITED SKILLED TRADES, INC.,

Plaintiff-Appellee,

v

CITY OF WYANDOTTE and WYANDOTTE
MUNICIPAL SERVICES,

Defendants-Appellants,

and

KEVIN MAYNARD,

Defendant.

UNPUBLISHED

April 2, 2013

No. 298380

Wayne Circuit Court

LC No. 05-508044-CK

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendants, City of Wyandotte and Wyandotte Municipal Services (collectively referred to as “the City”) appeal as of right the judgment entered in favor of plaintiff, United Skilled Trades, Inc. (“UST”), in the amount of \$1,207,641.45. We reverse and remand for further proceedings in accordance with this opinion.

I. BACKGROUND

This appeal arises from a contract dispute involving a fixed bid contract executed between UST and the City for inspection and maintenance work on one of the City’s turbine generators. The fixed bid contract submitted by UST to the City was for \$214,995 to provide labor and inspection services for the generator. The dispute in the trial court focused on change orders submitted by UST to the City seeking payment for extra work performed outside the scope of work defined in the original fixed bid contract.

The contract at issue comprised a fixed bid for the disassembly, inspection and reassembly of “Turbine S/N 114919, Unit Number 5.” The fixed bid contract defined the scope of work as follows:

The Contractor agrees to supply all craft labor, supervisory personnel, Technical Directors, specialized services and equipment required to complete the

Scope of Work as described herein. The Scope of Work *does not include major repairs, realignment or balancing found to be necessary as a result of the inspection*. Routine fitting or replacement or repaired parts shall be considered part of the basic Scope of Work [Emphasis added.]

The Scope of Work provision of the fixed bid contract proceeds over nine pages to delineate from the initiation of “Pre-Outage Activities” through “Startup” the exact activities to be engaged in by the contractor, which comprise the extent of the work to be performed. In addition, the bid packet provides a listing of items or supplies that are to be provided, respectively, by the City and UST. The contract specifically excluded any provision for any major repair work or extra work to be performed. While the parties anticipated that extra work would be required once the disassembly and inspection were initiated, there were no provisions in the fixed bid contract governing whether UST would perform the extra work, if the City would bid out such repairs or how such work would be compensated.

Initially, the trial court verbally ruled that UST was entitled to compensation under the doctrine of quantum meruit. But, in an unusual twist, more than a year later when reinstating the case for entry of a written judgment following an administrative dismissal, the trial court indicated it had committed an error of law in using quantum meruit as the legal theory for relief when there existed a fixed bid contract. The trial court found that the *absence* of language in the fixed bid contract regarding the extent of extra work, who would perform it and the manner of payment for it, comprised an ambiguity necessitating the trial court’s interpretation.

II. ANALYSIS

The City contends the trial court erred in awarding damages to UST premised on a contract theory. This Court reviews a trial court’s findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Whether the facts presented to the trial court resulted in the formation of a contract constitutes an issue of law that we review de novo. *Bracco v Mich Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). When applying the clearly erroneous standard, “regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake” was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

We hold that the trial court erred when it determined that the fixed bid contract comprised an express contract that encompassed the provision of extra work, either in total or with respect to change orders 12 and 13. As an initial premise, contracts are to be construed in their entirety, *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000), with effect to be given to every word or phrase that is contained therein, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). While there existed an express agreement to perform work between the City and UST, the fixed bid contract specifically indicated that it did not cover or encompass any extra work. The mere fact that the parties anticipated that extra work or repairs

might be necessary does not alter the actual content of the fixed bid contract or expand the delineated scope of work.

Based on the actual language of the fixed bid contract, the trial court erred in determining that an ambiguity existed necessitating its interpretation by use of outside sources. “A contract is ambiguous when two provisions ‘irreconcilably conflict with each other’ or ‘when [a term] is equally susceptible to more than a single meaning[.]’” *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (citations omitted). A contract is deemed to suffer from a “latent ambiguity” when “the language in the contract appears to be clear and intelligible and suggests a single meaning, but other facts create the ‘necessity for interpretation or a choice among two or more possible meanings.’” *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010) (quotation marks, citations, and footnote omitted). It is also, however, well-recognized that a court cannot “create ambiguity where the terms of the contract are clear.” *City of Grosse Pointe Park v Mich Mun Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). Further, silence within a contract is not construed as the equivalent of an ambiguity. See *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993). Hence, simply because the contract did not address extra work did not make the contract ambiguous.¹ There was also no latent ambiguity because no facts were presented that placed into doubt the meaning of the fixed bid contract such that the court had to choose between two or more possible meanings. The simple fact was that the original fixed bid contract did not address the performance of extra work.

Additionally, there was no evidence establishing a meeting of the minds relative to Change Orders 12 and 13. In order to become amendments to the original fixed bid contracts, the change orders specifically require that the city manager sign the change order to be effective. The change order forms contained the following language in bold:

By the signatures below this Change Order hereby amends the above referenced contract. All other Terms and Conditions of the Original Contract shall remain in full force and effect.

* * *

Note: This Change Order becomes effective only when it is signed by the General Manager.

It is undisputed that the general manager did not sign either change order (and in fact the city objected to the work contained in the orders), and thus neither could constitute a validly contracted amendment to the original fixed bid contract. See *Independence Twp v Reliance Bldg Co*, 175 Mich App 48, 54; 437 NW2d 22 (1989).

¹ Indeed, in both of its rulings from the bench the trial court found that the fixed bid contract contained no provision addressing extra work.

As the City concedes on appeal (and the trial court initially ruled), because the work to be performed was verbally authorized but the method or amount of compensation had not been agreed upon through the signing of Change Orders 12 and 13, the proper method of valuation would be through quantum meruit to “cover[] only such services as produced definite valuable results” *Rippey v Wilson*, 280 Mich 233, 246; 273 NW 552 (1937). In general, the parties do not contest that the work performed by UST was necessary and authorized. The dispute centers on whether any of the extra work billed by UST fell within the original scope of work delineated by the fixed bid contract and the price to be charged for the extra work performed. As discussed in *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006):

The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another. However, a contract will be implied only if there is no express contract covering the same subject matter. Generally, an implied contract may not be found if there is an express contract between the same parties on the same subject matter. [Quotation marks and citations omitted.] [Emphasis deleted.]

In this case, UST is not seeking payment for work performed in accordance with the terms of the original fixed bid contract. Rather, UST is trying to obtain payment for work and materials provided but not contemplated within the original contract but approved by the City while commensurately engaged in fulfilling the fixed bid contract. “Michigan law . . . permits an action in *quantum meruit*, even in the face of an express contract, where the performance of additional work or benefit not contemplated in the express contract is present.” *Lansing Bd of Water & Light v Deerfield Ins Co*, 183 F Supp 2d 979, 991 (WD Mich 2002). Because UST is seeking reimbursement for work outside the fixed bid contract, the use of quantum meruit is the correct legal theory supporting recovery by UST.

The City also challenges the trial court’s award of late fees on a compound basis. This Court “review[s] de novo questions involving the proper interpretation of a contract and the legal effect of a contractual clause.” *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). We review a trial court’s findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C); *Chapdelaine*, 247 Mich App at 169. Where a court following a bench trial has determined the issue of damages, this Court reviews the award for clear error. *Peterson v Dep’t of Transp*, 154 Mich App 790, 799; 399 NW2d 414 (1986).

The invoices generated by UST, which accompanied the change orders completed at the City’s behest, included the following language: “A 1-1/2% late fee will be charged on all past due invoices.” Similarly, the rate sheet submitted by UST denotes: “Finance Charge 1 1/2% (per month) applies to late payments.” At the hearing on the motion to amend the judgment, the City’s counsel conceded that a late charge of 1.5 percent accrued, but disputed UST’s subsequent compounding of the rate. The City contends that, despite the inclusion of language pertaining to the imposition of a late fee on UST’s invoices, there was no actual agreement by the City to incur late fees for delays in payment. We conclude that the trial court’s award of late fees on a contract basis was in error for the reasons we have already explained, i.e., that no contract existed between the parties relative to the work performed under change orders 12 and 13.

However, even if late fees were permissible in this case, the trial court's calculation of the late fee charges on a compounded basis was in error, for "[a]s a general rule, the law disfavors compound interest and will allow for the payment of compound interest only in the presence of a statute or agreement providing for the payment of compound interest" *Norman*, 201 Mich App at 184. This Court has specifically determined:

[I]n the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, the rule in this state is that interest shall be calculated on the basis of simple interest rather than compound interest. In the case at bar, there is no statute that specifically provides for the payment of compound interest, and the parties' agreement . . . does not explicitly provide for compound interest. This silence, rather than being ambiguous, means that the interest shall be calculated on the basis of simple interest rather than compound interest in the absence of some special circumstance dictating otherwise. [*Norman*, 201 Mich App at 187.]

Consequently, in the absence of a statute or agreement specifically providing for compound interest, calculation on a compounded basis would have constituted error had late fees been properly awarded.

The City also contends that the trial court committed error by permitting the recovery of both late fees and judgment interest beyond the filing date of UST's complaint. However, in light of our holding that plaintiff cannot recover late fees, this issue need not be addressed.²

However, because the judgment on remand will be based on the equitable theory of quantum meruit, *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003), UST is not entitled to interest in accordance with MCL 600.6013, which is applicable only to "money judgments" at law, see *McPeak v McPeak (On Remand)*, 233 Mich App 483, 497; 593 NW2d 180 (1999); *Giannetti v Cornillie (On Remand)*, 209 Mich App 96, 101; 530 NW2d 121 (1995). Further, MCL 438.7 is applicable to the award of interest in contract disputes and,

² In any event there is no support in the law for the City's contention that the trial court was precluded from awarding both judgment interest and late fees. Late fees are not construed as a form of interest. See *Ericksen v Fisher*, 166 Mich App 439, 447-449; 421 NW2d 193 (1988); *Barbour v Handlos Real Estate & Bldg Corp*, 152 Mich App 174, 188; 393 NW2d 581 (1986). Late fees are construed as penalties, constituting an "extra charge against a party who violates a contractual provision." Black's Law Dictionary (9th ed). Late fees are typically incurred due to a lack of diligence in payment. In contrast, interest is not construed as a penalty but rather as part of a judgment and compensating the entity owed for the lost time-value of the money incurred during the length of the litigation. See *Xerox Corp v Oakland Co*, 191 Mich App 433, 441; 478 NW2d 702 (1991). "A penalty is a means of punishment; interest a means of compensation." *United States v Childs*, 266 US 304, 307; 45 S Ct 110; 69 L Ed 299 (1924). As late fees and judgment interest are distinguishable and do not fulfill the same purpose or function, the City's assertion that the award of both constitutes an improper double recovery is without merit.

therefore, pertains solely to awards of post-judgment interest. *Nat'l Union Fire Ins Co v Richman*, 205 Mich App 162, 166-167; 517 NW2d 278 (1994). As a consequence, neither of the interest statutes is applicable under the circumstances of this case.

This is not to suggest the trial court is without authority to award interest in accordance with its equitable powers. An award of interest in an equity case is within the sound discretion of the trial court, *Reigle v Reigle*, 189 Mich App 386, 393; 474 NW2d 297 (1991), and is “granted solely pursuant to the equitable powers of the court[.]” *Thomas v Thomas (On Remand)*, 176 Mich App 90, 92; 439 NW2d 270 (1989). The purpose underlying an award of interest pursuant to MCL 600.6013 is “to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages.” *Phinney v Perlmutter*, 222 Mich App 513, 541; 564 NW2d 532 (1997). In contrast:

An equitable award of interest . . . “is not intended to serve the purpose of compensating a party for lost use of funds.” Rather, an award of interest for overdue payment . . . “prevents the delinquent party from realizing a windfall and assures prompt compliance with court orders.” [*Olson v Olson*, 273 Mich App 247, 354-355; 729 NW2d 908 (2006) (citations omitted).]

Consequently, we remand the issue of the award of interest to the trial court for reconsideration in light of the purpose of such an award in equity.

The City also takes issue with the accrual of judgment interest and late fees during the time period when this case was mistakenly administratively dismissed by the trial court. Specifically, the City contests the award of \$29,885.48 in statutory judgment interest awarded to UST for the period of time spanning June 12, 2008, to March 16, 2010, while this case was administratively dismissed.

Militating against the trial court’s award of interest for this time period is the well-recognized precept that “a court speaks through its written orders and judgments, not through its oral pronouncements.” *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). The trial court’s original verbal ruling was never reduced to a writing. As such, the City’s obligation to remit payment was not immediately effectuated and interest should not be charged.

Further, while MCR 2.602, which governs the entry of judgments, does not require that the prevailing party prepare the judgment, this does comprise the customary practice. *Griffin v Mich Civil Serv Comm*, 134 Mich App 413, 417 n 1; 351 NW2d 310 (1984). While UST contends it was desperate for funds and that the failure of the City to pay resulted in the loss of its business, it does not explain its own dilatory behavior in failing to pursue entry of a written judgment given its alleged dire financial straits. There is no suggestion by the parties, the trial court or within the record that the City purposefully or intentionally engaged in acts to delay entry of a judgment that were unfounded or not based on a legitimate dispute regarding the content of the judgment as comporting with the trial court’s ruling.

The preparation of a judgment comprises “a joint obligation of the parties which was ignored by both parties in this case.” *Griffin*, 134 Mich App at 417 n 1. As the responsibility of UST and the City was co-extensive in procuring entry of a written judgment, it was an abuse of

discretion for the trial court to impose the sole burden for this failure on the City or to impose judgment interest when an actual written judgment did not exist.

The City further contends the lack of sufficient evidence to support the trial court's damage award of \$388,179 in favor of UST. Primarily the City asserts that the trial court misconstrued or mischaracterized the testimony of its expert, David Rasmussen, as Rasmussen opined that UST was only entitled to compensation in the amount of \$71,925 for the disputed additional work performed comprising Change Orders 12 and 13.

Any challenge to the sufficiency of evidence in a civil case is waived if the party has failed to raise the issue in a timely motion at trial. *Napier v Jacobs*, 429 Mich 222, 238; 414 NW2d 862 (1987). We review a damages award from a bench trial under the clearly erroneous standard. The reviewing court must provide something more tangible than a mere difference of opinion before setting aside a non-jury award. *Peterson*, 154 Mich App at 799-800. When this Court determines that a trial court was aware of the issues and correctly applied the law, clear error will not be found to have occurred as long as the damage award falls within the range of the evidence presented. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

In accordance with the application of the clearly erroneous standard of review, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters*, 239 Mich App at 456. In this instance, while the trial court did give weight and attribute credibility to Rasmussen's testimony, it was not required to accept his opinions in their entirety. "Special deference is given to the trial court's findings when they are based on the credibility of witnesses." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). After review of the trial court's findings and the evidence presented to it, and given the disparate testimony regarding both the necessity and value of the work performed, it cannot be said definitively that the trial court committed clear error in its ruling regarding the amount of the award to UST. Because when reviewing a sufficiency of the evidence claim this Court will defer to the factfinder's determination on factual issues, particularly when they involve the credibility of witnesses,³ we cannot conclude that the trial court's award in favor of UST was clearly erroneous.

Finally, the City asserts, following corrections to the various errors in the judgment, that it is entitled to case evaluation sanctions in accordance with MCR 2.403(O). The party rejecting a case evaluation award is subject to sanctions if that party fails to improve its position by proceeding to verdict. MCR 2.403(O)(1); *Rohl v Leone*, 258 Mich App 72, 75; 669 NW2d 579 (2003). In certain circumstances, the imposition of case evaluation sanctions is mandatory. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-130; 573 NW2d 61 (1997). This Court reviews "de novo a trial court's decision to impose sanctions." *Rohl*, 258 Mich App at 75.

³ See *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

At case evaluation the panel recommended an award of \$575,000 in favor of UST, which the City accepted and UST failed to accept or reject as required by MCR 2.403(L)(1). The City contends that correction of the trial court's various errors in awarding UST contractual damages, judgment interest, late fees, use of compounded interest and the deduction of interest imposed while the case was administratively dismissed would entitle it to case evaluation sanctions. Because it is necessary to remand this matter to the trial court for recalculation of interest, late fees and other factors comprising the award to UST, the City's entitlement to case evaluation sanctions will be contingent upon any amended award.

MCR 2.403(O)(1) is a mandatory rule, which requires the party rejecting a case evaluation to "pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." *Haliw v City of Sterling Hts (On Remand)*, 266 Mich App 444, 447; 702 NW2d 637 (2005) (quotation marks and citation omitted). "The purpose of case evaluation sanctions is to shift the financial burden of trial onto 'the party who demands a trial by rejecting a proposed [case evaluation] award.'" *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006), quoting *Bennett v Weitz*, 220 Mich App 295, 301; 559 NW2d 354 (1996). "The decision to award case evaluation sanctions is determined as a matter of law; it is not a discretionary matter." *Id.*

In order for the City to qualify for the imposition of sanctions, UST, as the rejecting party, was required to improve its position by more than 10 percent of the case evaluation panel's award determination of \$575,000. Based on the calculations provided in MCR 2.403(O)(1), (3), for sanctions to be awarded, UST would have to receive a judgment, following the assessment and inclusion of "assessable costs and interest," equal to or greater than \$632,500. The final judgment issued by the trial court on March 16, 2010, indicated a total award of \$1,207,641.45. Because it is necessary to remand this matter for, *inter alia*, recalculation of interest and the vacating of the interest award of \$29,537.97 imposed during the time period this matter was administratively dismissed in the lower court, there exists a possibility that the final award to UST will not meet the threshold of \$632,500, thereby entitling the City to sanctions. Therefore, the issue of case evaluation sanctions and their applicability cannot be determined until all corrections have been effectuated by the trial court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray